PP

v.

KANDIAH SUBRAMANIAM

HIGH COURT MALAYA, SHAH ALAM
SYED AHMAD HELMY J
[CRIMINAL TRIAL NO: 45-53-06]
26 SEPTEMBER 2008

CRIMINAL LAW: *Firearms (Increased Penalties) Act 1971 - Section 3 - Discharging firearm with intent to cause death or hurt while committing scheduled offence - Essential ingredients of offence - Shots discharged from policeman's firearm during struggle with accused - Whether discharge of shots made by policeman or accused - Whether reasonable doubt created thereof - Whether accused to be acquitted and discharged*

The accused was charged with an offence under s. 3 of the Firearms (Increased Penalties) Act 1971 ('the Act') for discharging a firearm with intent to cause death or hurt while committing a scheduled offence. Before the learned judge, evidence was adduced that the accused, while resisting arrest by a police officer ('SP5'), had seized the latter's revolver and thereafter discharged two shots from the said revolver. There was some discrepancy in SP5's testimony in court and his police report ('P16') as to when the two shots were fired, and there were also suggestions by the defence during cross-examination *inter alia* that the shots were fired by SP5 and not the accused. That notwithstanding, the learned judge, upon the satisfaction that the discrepancy did not materially affect the core of the prosecution's case, ruled that a *prima facie* case had been made out, and hence called for the accused to enter his defence. The accused, in his defence, did not dispute the fact of the struggle but reiterated that it was SP5 who discharged the two shots. The accused further averred: (i) that on the day in question, he was conveying goods and computers belonging to 3 men in his lorry when SP5 and two other policemen on two motorcycles approached him; (ii) that the 3 men absconded upon seeing the policemen; (iii) that when he stopped and alighted from his lorry, SP5 pointed a pistol at him shouting repeatedly "saya akan tembak awak nanti"; (iv) that SP5 also hit and kicked him; (v) that as SP5 was about to kick him for the

A third time, he grabbed SP5's right leg whereof SP5 fell backwards and discharged the first shot; (vi) that he then jumped onto SP5's body and in the ensuing struggle, while the pistol was still in SP5's possession, another shot was discharged; (vii) that he thereafter seized the pistol from SP5, after which he ran away and B threw the pistol into the bushes; and (viii) that he had no intention of causing hurt to SP5 and his sole objective of running away after seizing the pistol was because he feared for his life. This being the accused's version of the events, at the end of the trial, and as required by law, it fell upon the learned judge to C consider whether the prosecution had proved its case beyond reasonable doubt, and consequently whether to convict or acquit the accused on the preferred charge.

Held (acquitting and discharging accused):

D **(1)** Based on the evidence, at the end of the prosecution's case, the court was satisfied that the prosecution had proven a prima facie case on the charge preferred. The discrepancy in the oral testimony of SP5 and his police report in P16 as to when the two shots were fired did not, at the stage, materially E affect the foundation of the prosecution's case that two shots were discharged from the revolver. Further, there was an explanation by SP5 in that he was traumatized by the incident and was in that state when he made the police report some 3 1/2 hours later. The court hence had no reason to reject F SP5's testimony as incredible and accordingly accepted his testimony. (paras 13 & 25)

(2) The essential ingredient of s. 3 of the Act is that the discharge of the firearm was made by the accused with the G intention to cause death or hurt. The burden is on the prosecution throughout to prove beyond reasonable doubt that it was the accused that discharged the firearm with the intention to cause death or hurt. (paras 36 & 37)

H **(3)** Upon an evaluation of the totality of the evidence, it was incumbent upon the court to revisit the discrepancy appearing in the testimony of SP5 and his police report in P16 as to the manner the two shots were discharged and the statement made by the accused under s. 113 of the Criminal Procedure I Code in D19 (*inter alia* that it was SP5 who discharged the

two shots), as it would have a determinative effect as to whether it was the accused who discharged the two shots. (para 38)

(4) At the end of the prosecution's case, based on SP5's denial to the suggestion by the defence that he had fired the shot as he fell backwards to the ground after the accused had pushed his right leg, the court had accepted the oral evidence of SP5. As it were, that oral evidence was supported by SP5's police report in P16 where he stated that two shots were fired by the accused. However, in the light of the sworn testimony of the accused, the suggestion made had concretized into evidence, and called for a revisit of the court's earlier conclusion. Upon reassessing the evidence, the court could not dismiss the accused's version that it was SP5 who had discharged the two shots. In other words, a doubt was created in the court's mind as to the culpability of the accused, leading the court to conclude that the possibility of SP5 discharging the two shots could not be discounted. (paras 39 & 40)

(5) To earn an acquittal, the accused's duty is only to cast a reasonable doubt on the prosecution's case. Having so discharged the burden, the accused is accordingly acquitted and discharged from the charge. (paras 41 & 42)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohamed Alias v. PP [1981] 1 LNS 200 ***(refd)***
PP v. Rajan Sinniah [2007] 8 CLJ 674 HC ***(refd)***
Sheffield City Counsel v. Graingers Wines Ltd [1978] 2 All ER 70 ***(refd)***
Sun Kam Heng v. PP [1993] 1 CLJ 109 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 51A, 113
Firearms (Increased Penalties) Act 1971, s. 3

For the accused - Baljit Singh; M/s Shukor Baljit & Partners
For the prosecution - Wan Shaharuddin (En Azmeer with him) DPPs; AG's Chambers

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Syed Ahmad Helmy J:

[1] Accused is charged for an offence under s. 3 of the Firearms (Increased Penalties) Act 1971 (hereinafter called the Act) and the charge reads as follows:

> Bahawa kamu, pada 3 Mei 2006, jam lebih kurang 6.09 pagi, di bawah jambatan Taman Kinrara, berhampiran stesen minyak Esso, Batu 7.1/2, Jalan Klang Lama, Puchong, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, semasa kamu cuba melawan untuk melepaskan diri dari tangkapan yang sah oleh seorang anggota polis iaitu penjawat awam bernama Khairul Anuar b. Sarbini (KPT: RF 142493), kamu telah merampas sepucuk pistol jenis Revolver .38 Smith & Wesson, ukuran 2 inci, no. siri J789491, dan telah melepaskan dua das tembakan daripada pistol tersebut dengan niat hendak menyebabkan kematian atau kecederaan terhadap anggota polis tersebut dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 3 Akta Senjatapi (Penalti Lebih Berat) 1971.

[2] The requisite ingredients that has to be established by the prosecution in a charge under s. 3 of the Act is two fold, namely:

1. that the accused committed a scheduled offence, in resisting arrest by a police officer;

2. that at the time of committing the scheduled offence, the accused discharged a firearm with the intention to cause death or hurt to the victim notwithstanding that no hurt is caused thereby.

[3] As was established by the Federal Court in *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85 the standard of proof on the prosecution at the close of its case is to make out a *prima facie*. A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer. Hence a *prima facie* case is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side.

[4] The court in determining whether the prosecution has made out a *prima facie* case must subject the prosecution's evidence to maximum evaluation.

[5] The prosecution in support of the charge called eight witnesses and hence it behoves on this court to subject the evidence adduced to maximum evaluation in determining whether a *prima facie* case has been made out or not.

[6] Learned counsel for the accused Mr. Baljit Singh advanced five grounds in his submission that the prosecution has failed to make out a *prima facie* case.

[7] There was tampering of the Arms Register Book which was marked as exh. D12 where liquid paper was applied in the Arm No. column and the Arm No. J789491 was written over it which gives rise to material defects and a doubt has arisen as to the identity of the revolver used in this case and relies on the Supreme Court decision in *Sun Kam Heng v. PP* [1992] 1 LNS 35.

[8] From the evidence adduced and in particular to the testimony of SP4 Constable Nor Azhar bin Abdul Wahab the storekeeper of the Armoury at Balai Polis Puchong the revolver .38 with the serial number J789491 was handed to L/Kpl Khairul Annuar bin Sarbini (SP5) together with 30 bullets on 3 May 2006 at 4 in the morning.

[9] In cross examination he admitted that he was the one who applied the liquid paper in the Arm No. column to erase the serial number originally inserted and writing the serial No. J789491 over the erasure. He explained why he did so in that the serial number originally inserted was for another police personnel but because SP5 came earlier he made the amendments as such.

[10] In approaching the issue raised the determination of same cannot be arrived at by looking at SP4's testimony in isolation but rather in totality together with the evidence of the other witnesses of the prosecution.

[11] I have scrutinised the evidence of SP4 and though the witness is rather slow in answering questions raised in cross examination nevertheless upon evaluating his evidence in totality together with the evidence of SP5 I cannot reject his explanation as to the erasure made by way of liquid paper and it is my finding that the revolver .38 was the revolver handed over by him to SP5, My finding is predicated by the fact that the signature of SP5 as

A the recipient is in column 9 of D12 and there was no challenge whatsoever in the cross-examination of SP5 that he was not the person who received the .38 revolver from SP4 and that the revolver was in the possession of SP5 when he was on his rounds on 3 May 2006.

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The numbering in numerical sequence as appears in column 1 of the Arms Register (D12) further supports my finding.

[12] The second issue raised by learned defence counsel was the discrepancy in the oral testimony of SP5 and his police report in P16 as to when the two shots were discharged which the defence contends amounted to serious discrepancy. The discrepancy highlighted by defence counsel was that in his testimony in court SP5 testified that the first shot was discharged during the struggle between SP5 and the accused and the second shot when SP5 chased the accused whereas in P16 SP5 stated that two shots were discharged by the accused when SP5 was chasing the accused and-in support thereof advanced the cases of *Public Prosecutor v. Rajan Sinniah* [2007] 8 CLJ 674 and *Herchun Singh & Ors v. PP* [1969] 1 LNS 52.

[13] Upon evaluating SP5's testimony in court and the police report P16 made by him it cannot be disputed that two shots were discharged from the revolver P5 bearing registration number J789491 by the accused who successfully seized the pistol in the struggle with SP5. The discrepancy as to his oral testimony during the struggle and the second when he was chasing the accused does not at this stage materially affect the core of the prosecution's case that two shots were discharged from the revolver P5 which was issued to SP5 as corroborated by the testimony of SP5, SP7 and SP2. Further the accused in his cautioned statement which was admitted as exh. D19 did not dispute the successful seizure of P5 by the accused in the struggle with SP5 and more importantly the explanation by SP5 as to the discrepancy in that he was traumatised by the incident and was in that state when he made the police report P16 some 3 1/2 hours after the incident.

[14] In my audio-visual advantage of the evidence given by SP5 I have no reason to reject his testimony as incredible and I accordingly accept his testimony and ruled that the discrepancy herein is not material as to affect the foundation of the prosecution's case.

[15] In short the materiality of the discrepancy has been negative upon an overall evaluation of the testimony of the prosecution's witness.

Issue Of Fingerprints

[16] The issue of the absence of fingerprints *per se* does not to my mind negative the prosecution's case as the evidence as to the nexus of P5 and the accused has to be viewed in totality together with the testimony of the prosecution's other witnesses.

[17] Issue of inconsistency in the evidence of SP2, SP5, SP6 and SP7 and the incomplete investigation.

The inconsistency focussed upon by learned counsel for the defence was the number of police personnel involved in the raid where SP2 in his evidence testified that four personnel was at the place of incident whereas the photographs taken by SP3 showed about 8 to 10 police personnel. Again defence counsel raised the manner in which the exhibits were kept which gave rise to the chain of evidence being broken in respect of the safe keeping of the exhibits.

[18] Discrepancy to my mind does exist – it cannot be denied that witnesses will invariably have various and somewhat different powers of perception but so long as it is not material the discrepancies are acceptable. It is trite that the fact that there are discrepancies in a witness' testimony does not straightaway make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept part of the witness evidence if it considers them to be true. In considering the discrepancies the court should take into account the educational background and experience of the witness and whether the witness is describing events which have taken place recently or a long time ago and his demeanour – *Mohamed Alias v. Public Prosecutor* [1981] 1 LNS 200.

[19] In the case at hand defence counsel's challenge is pivoted on the failure of SP7 to satisfactorily account for the safekeeping of the revolver P5 from the time SP2 handed P5 to him on 9 May 2006 until 11 May 2006 when he handed P5 to ASP Izanizam for finger printing. SP7 in his evidence in chief stated that

A at 1pm on 9 May 2006 SP2 handed to him P5, 2 live bullets and 2 bullet casing. SP7's testimony as regards the handing over of P5 to him by SP2 was reaffirmed by him in cross-examination and the serial number of J789491 of P5 was also to be found in the chamber. In re-examination SP7 reiterated that P5 was the-same B revolver that he received from SP2.

[20] In the light of the sequence of the testimony of SP7 in examination in chief, cross-examination and re-examination the discernible feature is that the identity of P5 remains unchallenged. C Since the identity of the revolver remains unchallenged in that P5 was the same revolver which was produced in court and the evidence of the Chemist that it was SP7 who handed him the revolver P5 on 23 June 2006 for ballistic test, I am satisfied that there is no gap in the core of the prosecution's case as regards D P5 as strenuously urged by learned defence counsel.

[21] Issue of non-compliance with s. 51A of the Criminal Procedure Code.

On the issue of the prosecution's failure to abide to the provisions E of s. 51A of the Criminal Procedure Code in failing to deliver copies of the police reports marked P17 and P18 dated 3 May 2006 and 9 May 2006 respectively before the trial it is learned defence counsel's submission that the non-compliance is fatal and renders P17 and P18 inadmissible.

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[22] Section 51A is a new provision which was introduced through Amendment Act A1274/06 incorporating the mechanism of pre-trial discovery in the administration of criminal justice.

G The section reads as follows:

> 51A (1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:
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> (a) a copy of the information made under section 107 relating to the commission of the offence to which the H accused is charged, if any;
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> (b) a copy of any document which would be tendered as part of the evidence for the prosecution; and

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(c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

(2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

[23] Though the wording of the section is predicated by the word "shall" nevertheless to my mind of particular importance is the question of relevancy and prejudicial effect of P17 and P18. It is also prudent to be minded of the salutary advice of Lord Denning MR in *Sheffield City Counsel v. Graingers Wines Ltd.* [1978] 2 All ER 70 at p. 72 to the effect that "it is always a matter of impression" in determining whether the word "shall" is to be treated as mandatory or directory.

[24] On the question of relevancy and prejudicial effect of P17 and P18, I am of the considered view that the report in P17 which relates to the finding of the lorry driven by the accused is for the purpose of completing the sequence of events involving the accused whereas P18 was relevant for the purpose of supporting the accused's act of surrendering to the police.

[25] Based on the reasoning aforesaid I am satisfied that the prosecution has proven a *prima facie* case on the charge preferred against the accused and he is accordingly called upon to enter his defence.

[26] Upon defence being called the accused elected to give evidence on oath. According to the accused on 3 May 2006 he received a call to rent his lorry for purpose of moving office in Puchong. Upon arrival three men began loading goods and computers into his lorry.

[27] Upon the goods being placed on to the lorry the three men got into the lorry and whilst the lorry was about to move the three men saw three uninformed policeman on two motorcycles approaching them. The three men got out of the lorry and asked the accused to drive the lorry away. Suspecting that there was something wrong with the goods that were loaded he quickly drove the lorry with the policeman later identified as SP5 in hot pursuit until he came to a dead end. He alighted from the lorry and saw SP5 in front of the lorry pointing a pistol at him

whereupon he raised both his hands and submitted to the custody of the policeman. He knelt on both knees and raised and placed both hands behind his neck. SP5 kept pointing the pistol at him and uttered the words "saya akan tembak awak nanti" 4 or 5 times.

[28] According to the accused he feared that he would be shot when hearing the utterances aforesaid. The policeman asked him where his other friends were and hit and kicked him on the face twice whilst continuing to point the pistol at him. When SP5 sought to kick him the third time the accused managed to grab his right leg and SP5 fell backwards whereupon he heard a shot being discharged from the pistol which was in the possession of SP5. The accused then jumped on to SP5's body and in the ensuing struggle whilst the pistol was still in the possession of SP5 another shot was discharged from the pistol. The accused held both the wrist of SP5 in the struggle and in the light of the two shots discharged from the pistol and fearing for his life he managed to seize the pistol from SP5. According to the accused he seized the pistol to save himself and began running away together with the pistol. Whilst running away he heard SP5 shouting for the return of the pistol. When he was a safe distance away from SP5 he threw the pistol in the bushes. Six days later he surrendered himself to the police at Balai Polis Puchong after having read from the Tamil Malaysia Namban that he ran away with the pistol. He gave a statement to the police which was tendered as defence exh. D19. He gave his co-operation to the police and assisted the police to recover the pistol from the bushes which was the spot where he threw the pistol in making his getaway. He had no intention of causing hurt to SP5 and his sole objective of running away after seizing the pistol from SP5 was because he feared for his life. The two shots discharged from the pistol was made by SP5 and he threw it in the bushes after he felt safe to do so.

[29] The core of the accused's defence was that the discharge of the two shots from the pistol was made by SP5 and not him and the reason behind his seizure of the pistol was to save himself from being shot. It is the defence contention that upon evaluating the totality of the evidence adduced there are 3 versions on how the two shots were discharged.

[30] The first version relates to the testimony of SP5 at p. 27 of the notes of evidence where he stated that the accused discharged the first shot when he was lying on his back on the ground and the second shot discharged by the accused was when he was about 10 meters from the accused who refused to comply with his request to return the pistol to him.

[31] The second version relates to the police report of SP5 which was marked as exh. P6 where SP5 testified that after the struggle whereupon the accused managed to seize the pistol from him and upon his pursuit of the accused, two shots were fired at him by the accused.

[32] The third version was the accused's version that the first shot was fired by SP5 when the accused managed to hold on SP5's right leg and he fell backwards on to the ground and the second shot was fired again by SP5 during the struggle.

[33] It is trite that when a fact situation gives rise to 3 different versions the version most favourable to the accused has to be adopted.

[34] Now at the defence stage upon the sworn testimony by the accused it behoves the court to conduct a maximum evaluation and re-evaluation of all the evidence as adduced through the prosecution's witness and the accused. Whatever suggestion made by the defence to the prosecution witness has now crystallised as evidence through the sworn testimony of the accused.

[35] On this score learned defence counsel strenuously urged that the version of the accused should be accepted that all along the two shots discharged from the pistol was made by SP5 and the reason behind his seizure of the pistol during the struggle was to save himself from being shot. The reason aforesaid was amply supported by the conduct of the accused in throwing the pistol seized in the. bushes after he felt that SP5 did not pursue him any more.

[36] The essential ingredient of s. 3 of the Act is that the discharge of the firearm was made by the accused with the intention to cause death or hurt.

[37] The burden is on the prosecution throughout the trial to prove beyond reasonable doubt that it was the accused that discharged the firearm with the intention to cause death or hurt. The failure to prove this essential ingredient would invariably result in the dismissal of the charge against the accused.

[38] Upon an evaluation of the totality of the evidence before me it is incumbent upon me to revisit the discrepancy appearing in the testimony of SP5 and his police report in P16 as to the manner the two shots were discharged and the statement made by the accused under s. 113 of the Criminal Procedure Code in D19 as it would have a determinative effect as to whether it was the accused who discharged the two shots.

[39] Now at the stage of the prosecution's case based on the denials by SP5 as to the suggestion made by defence counsel that SP5 fell backwards to the ground upon the accused pushing his right leg and the shot being fired by SP5, I had accepted the oral evidence of SP5 which was supported by his police report in P16 wherein it was stated that two shots were fired by the accused. However in the light of the sworn testimony of the accused the suggestion made has concretized into evidence and involves a revisiting of my earlier conclusion. The sworn testimony of the accused is now evidence that has to be scrutinised and evaluated against the evidence of SP5 and also the credibility as to who discharged the two shots. Upon reassessing the evidence I cannot dismiss the accused's version that it was SP5 who discharged the 2 shots.

[40] At the stage of the prosecution's case though there was a discrepancy between the testimony of SP5 in court and his police report in P16 as regards when the two shots were discharged from the pistol, I nevertheless ruled that it does not affect the core of the prosecution's case because of the common denominator of two shots being fired appearing in his oral testimony and police report in SP16. Now in the light of the sworn evidence of the accused that it was SP5 who discharged the two shots from the pistol a doubt is created in my mind as to the culpability of the accused and hence leads me to conclude that the possibility of SP5 discharging the two shots cannot be discounted.

[41] It is a well established principle of Malaysian Criminal Law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence for which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal his duty is merely to cast a reasonable doubt on the prosecution's case – see *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 1 CLJ 311 (Rep); [1991] 3 CLJ 2073.

[42] Having discharged the burden of casting a reasonable doubt the accused is accordingly acquitted and discharged from the charge herein.